BEFORE THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA

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IN THE MATTER OF APPLICATION FOR BENEFICIAL WATER USE PERMIT 76H-30005957 BY CHRISS A. MACK	))))	**FINAL ORDER**

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Pursuant to the Montana Water Use Act (Title 85, Chapter 2, Mont. Code Ann.), to the contested case provisions of the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) and after notice required by Mont. Code Ann. § 85-2-307, a hearing was held on March 2 and 3, 2005 in Missoula, Montana before Hearing Examiner Mary Vandenbosch to determine whether the issuance of a beneficial water use permit to Chriss A. Mack (hereinafter "Applicant") would be consistent with the requirements of Mont. Code Ann. § 85-2-311.

As a result of that hearing, a Proposal for Decision was entered on September 2, 2005. The Proposal for Decision recommended denial of the application, concluding that the Applicant had failed to prove by a preponderance of the evidence that the statutory criteria imposed by Mont. Code Ann. § 85-2-311 relevant to this application were met—that is, that the Applicant failed to prove that water was physically available, water was legally available and that existing water rights would not be adversely affected were the application granted.

Applicant, represented by David B. Cotner, Esq. and Phil McCreedy, Esq., filed timely exceptions to the Proposal for Decision on October 19, 2005[1], requesting that the Proposal for Decision be overturned or, in the alternative, that Applicant be granted a one year "temporary permit" in order to allow him to complete additional testing. Applicant offers no statutory or jurisprudential support for this latter alternative. The Department finds that this is not a court of equity, capable of fashioning broad remedies but an administrative review board with jurisdiction limited to the grant or denial of permit and change applications.

Applicant requested oral argument. The Severson group of objectors, represented by John Bloomquist, Esq., filed a response to Applicant's exceptions as did Objector Susan Brown,

[1] Applicants requested and received an extension of the 20-day deadline to file extensions provided by Mont. Admin. R. 36.12.229 by order of September 19, 2005. That extension gave Applicant until October 19, 2005.

appearing *pro se*. Oral argument was held in Helena, Montana, on May 9, 2006 before Hearing Examiner Britt T. Long. Mr. Cotner, Mr. McCreedy and Mr. Bloomquist appeared, as did Ms. Brown.

STANDARD OF REVIEW

The standard of review for a Proposal for Decision is established by Mont. Code Ann. § 2-4-621(3) as follows:

> The agency may adopt the proposal for decision as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

"Substantial evidence" is "evidence that a reasonable mind might accept as adequate to support a conclusion; it consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance." *Swain v. Battershell*, 1999 MT 101, ¶ 34, 294 Mont. 282, ¶ 34, 983 P.2d 873, ¶ 34.

DISCUSSION

Applicant's Exceptions

Applicant argues that the Hearing Examiner's Proposal for Decision was in error because the Hearing Examiner:

1) Applied a standard of proof in excess of the preponderance of the evidence standard required by Mont. Code Ann 85-2-311 (1);

2) Required adherence to aquifer test guidelines that had not been published at the time of the original application as the foundation for findings of fact 12, 14, 20, 22 and 23 and conclusion of law 8;

3) Incorrectly found (finding of fact 19) that the Applicant had not analyzed water rights on South Swamp, Robertson, Sapiel and South Burnt Fork Creeks "downstream from headgate 105."

4) Incorrectly concluded that the Applicant had failed to prove, by a preponderance of the evidence, that water was physically available in relying solely on the absence of timed drawdown data;

5) Incorrectly concluded that Applicant had failed to demonstrate that water was legally available;

6) Incorrectly found (finding of fact 20) that the Applicant had supplied inadequate information on the horizontal extent of the cone of depression;

7) Incorrectly concluded that Applicant failed to prove lack of adverse effect by a preponderance of the evidence;

8) Incorrectly applied the rule in the Department's *Takle* Decision;

9) Incorrectly found (finding of fact 22) that Applicant's consultant Tracey Turek's tests did not show lack of adverse effect by a preponderance of the evidence;

10) Incorrectly found (findings of fact 24 and 25) that the Applicant could not control water use in order to prevent adverse effect.

Objector's Responses

The Severson Group of Objectors as well as Ms. Brown argue that the Applicant failed to meet his burden of proof under Mont. Code Ann. § 85-2-311 and for the adoption of the Proposal for Decision, unaltered, as the Department's Final Decision.

Exception 1. Standard of Proof Applied by Hearing Examiner

Applicant's first exception argues that the Hearing Examiner required more than a preponderance of the evidence required by Mont. Code Ann. § 85-2-311 (1). "Preponderance of the evidence" means "such evidence as, when weighted with that opposed to it, has more convincing force and from which it results that the greater probability of truth lies therein,"

Ekwortzel v. Parker 156 Mont. 477, 484-485, 482 P.2d 559, 563 (1971), or "[e]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary 1064 (5th ed. 1979). Applicant argues that he presented the greater weight of evidence on all of the statutory criteria required by Mont. Code Ann. § 85-2-311. The Hearing Examiner found that he did not. In this exception, applicant offers no specific examples and points to no specific finding of fact or conclusion of law in support of his position. He does so, however, in subsequent exceptions. Those examples are addressed, below, in the order presented.

Exception 2. The Hearing Examiner required adherence to well and aquifer test guidelines that had not been published at the time of the original application.

Applicant's second exception argues that the Hearing Examiner found that the Applicant had failed to meet his burden of proof on the criteria defined in Mont. Code Ann. § 85-2-311 not because Applicant's tests were inadequate to show the evidence required by Mont. Code Ann. § 85-2-311 but because those tests were not in compliance with aquifer test rules promulgated after the submission of his application. Applicant questions findings of fact 12, 14, 20, 22 and 23 and conclusion of law 8 for this reason.

Applicant mischaracterizes the grounds for the proposal for decision. For example, in evaluating Applicant's evidence on physical availability, as required by 85-2-311 (1) (a) (i), the Hearing Examiner found that the Applicant had failed to make the required showing of physical availability because the Applicant had failed to produce evidence sufficient "to determine whether or not drawdown will remain above the pump intake throughout the period of diversion." (Finding of fact 14, page 9, lines 1-2), not because his tests failed to comply with 1995 guidelines or 2005 rules. In other words, the Hearing Examiner found that the Applicant failed to show whether water would be physically available during the entire proposed period of diversion without regard to either the 1995 guidelines or the 2005 rules.

Both the 1995 guidelines and the 2005 rules recognize that the adequacy of a given test is situation-specific. Both place the burden on the applicant to select and conduct aquifer tests that

demonstrate that the statutory criteria have been met. The 1995 guidelines, at paragraph 2 a, provide:

> [t]here are a variety of tests that can be performed on wells and aquifers, with a variety of objectives and procedures. The type of testing that is required for a well will depend on factors such as the expected typical use of the well, the condition of the aquifer the well is completed in. . . and potential interference with existing uses.

Paragraph 2 a iii provides that where "water availability is a known problem," "[a]dditional data may be needed," and "*it is up to the applicant* to either satisfy the [D]epartment and any objectors with information that demonstrates no adverse impact such that the objections are dropped, or bring adequate evidence to demonstrate no adverse impact. In certain circumstances, yield and drawdown tests or other information could demonstrate that adverse [e]ffects are unlikely without more elaborate aquifer testing procedures." (Emphasis added.)

The 2005 Rules, at 36.12.121 (1-2) provide,

> "[t]here are numerous tests that can be performed on wells and aquifers, with a variety of objectives and procedures. An adequate aquifer test will depend on factors such as whether the well is located in a basic closure area. . . the expected pumping schedule of the well, the potential interference with existing water rights and the characteristics of the aquifer in which the well is completed. (2) *Applicants are encouraged to confer with department staff prior to designing an aquifer test to ensure that the test will not have to be repeated*, which will require additional expense." (Emphasis added.)

Whether a given test is adequate to the applicant's desired purpose is a question of fact. Despite the expert testimony introduced by the Applicant that the tests conducted were adequate to demonstrate physical availability, the Hearing Examiner found that the tests run were inadequate, not specifically because they did not comply with 2005 rules but because they failed to demonstrate physical availability of water during the entire period of demand by a preponderance of the evidence (finding of fact 14). The Hearing Examiner concluded, in conclusion of law 6, that because the Applicant had shown no evidence that water would be physically available for more than 24 hours, the Applicant had not met his evidentiary burden. While the Applicant introduced expert testimony in support of physical availability, the Hearing Examiner relied upon the Applicant's own 24 hour aquifer test. Applicant does not argue that

his aquifer test is not competent and substantial evidence or that the Hearing Examiner misrepresented it, simply that the Hearing Examiner reached the wrong conclusion.

The Department may not reject or modify the Hearing Examiner's findings of fact unless it first reviews the complete record and states with particularity that the findings of fact were not based upon competent and substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The Department finds no basis to modify or reject findings of fact 12, 14, 20, 22 and 23.

Exception 3. The Hearing Examiner found (finding of fact 19) that the Applicant had not analyzed water rights on South Swamp, Robertson, Sapiel and South Burnt Fork Creeks "Downstream from headgate 105."

In finding of fact 19, The hearing Examiner found the "Applicant did not analyze water rights on Swamp Creek, Robertson Creek, Sapiel Creek and South Burnt Fork Creek downstream from headgate 105." Applicant counters with the logically inconsistent argument that the finding of fact is inaccurate not because any analysis was conducted but because the rights diverted below head gate 105 did not need to be analyzed. Applicant argued that no analysis was necessary because, "there is no surface water connection between the Applicant's proposed point of diversion and the referenced creeks except through [h]eadgate 105." (Applicant's exceptions, page 7).

Arguing that an analysis need not have been done does not equate to arguing that it was in fact done. Applicant cites the prefiled testimony of Tracey Turek, at pages 9-16 in support of his argument that all necessary analysis of rights downstream of headgate 105 was done because no analysis of rights downstream of headgate 105 was necessary. That testimony does not support the position that any analysis of surface rights diverting downstream of headgate 105 was done. In fact, that testimony reflects that Turek's analysis of rights on the named creeks was limited to rights diverting via headgate 105. To wit:

"I reviewed DNRC records to determine any water rights located in the vicinity of the proposed groundwater development. . .Several of the rights listed in the index are claims for surface water with a POD listed as being located in the NESW section 5, Twp o8N, Re 19W

[sic]. the POD is named headgate 105 as per the district court Amended Decree cause 556, signed June 15, 1978. The claims are for South Swamp Creek and South Burnt Fork Creek." Turek Pre-filed testimony, page 9. On the following page, Turek follows, "for the sole purpose of proving water is legally available, we will address the amount 'claimed' for diversions listed in the SW section 5 claiming headgate 105." Because the Department finds no analysis of rights downstream of headgate 105 in the sources Applicant references, only those rights for which headgate 105 is the point of diversion, the Department will not modify or reject finding of fact 19.

Exception 4. The Hearing Examiner, in relying solely on the absence of timed drawdown data, incorrectly concluded that the Applicant had failed to prove, by a preponderance of the evidence, that water was physically available;

> Applicant concedes the accuracy of finding of fact 13 which reads,
>
> Applicant did not provide time-drawdown data for the proposed well that was collected during the pump test referenced in finding of fact No. 12 and did not provide any projections of drawdown in the proposed well for the period of diversion based upon the pump test referenced in Finding of Fact No. 12 or any other pump test.

Applicant simply argues that the Hearing Examiner should not have relied on the absence of results from tests the Applicant did not believe were necessary, positing that in doing so the Hearing Examiner required more than the preponderance of evidence statutory standard on the issue of physical availability.

As noted in the Department's response to Exception #1, above, preponderance does not refer to the sheer quantity of evidence presented but also to its weight. Applicant essentially argues the Hearing Examiner mis-weighed the evidence and thereafter arrived at the wrong conclusion of law. Under Mont. Code Ann. § 2-4-621 (3), the Department may not reject or modify the Hearing Examiner's findings of fact unless it finds, after reviewing the complete record, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. "The purpose of § 2-4-621(3), MCA, as is the case with many of this Court's standards of

review, is to prevent a reviewing body from substituting its judgment for that of the factfinder." *State By and Through Dept. of Social and Rehabilitation Services v. Shodair Hosp*. 273 Mont. 155, 160, 902 P.2d 21, 24 (1995).

The Department finds that the absence of information, where the burden is on the Applicant, is itself substantial and competent evidence. The Department will not modify or reject the Hearing Examiner's finding. Given that finding, the conclusion that the Applicant did not demonstrate physical availability by a preponderance of the evidence is the product of a correct application of the law to the facts.

Exception 5. The Hearing Examiner concluded that Applicant had failed to demonstrate that water was legally available;

Without referring to any specific finding of fact or conclusion of law, the Applicant argues that the Hearing Examiner failed to be convinced by expert testimony in favor of the application. In findings of fact 15-20, the Hearing Examiner identified those facts which support the conclusion that the Applicant did not demonstrate that water was legally available by a preponderance of the evidence, conclusion of law 7. Applicant does not suggest that those findings were not supported by competent and substantial evidence and the Department does not so conclude. Therefore, Department finds the conclusion based on those findings a correct application of the law to the facts.

Exception 6. The Hearing Examiner found (finding of fact 20) that the Applicant had supplied inadequate information on the horizontal extent of the cone of depression;

Applicant argues that the prefiled testimony of Howard Newman, at pages 18-21 "provided substantial evidence that any effect of the cone of depression beyond the Applicant's own property would be unmeasurable." The Department's record contains Howard Newman's testimony ("NPT at pp. 18-21")[2], filed January 12, 2005 which contains only 13 pages, and Mr. Newman's revised testimony, filed January 14, 2006, containing 14 pages. Neither contains pages 18-21.

[2] "NPT" is identified as "Newman Pre-filed testimony" on page 9 of the Applicant's Exceptions.

In finding of fact 20, the Hearing Examiner cites Exhibits A-14, 16 and 17, O-12 and the testimony of Gary Andres and Howard Newman in support of the finding that a hypothetical well test modeled from an actual well test conducted for 2 hours at 14.7 gallons per minute (or less than 10 percent of the proposed well's capacity for a very small proportion of the proposed well's pumping time). In reviewing the record, the Department finds that the Hearing Examiner's finding was based on competent and substantial evidence contained in those exhibits and will not modify or revoke that finding.

Exception 7. The Hearing Examiner concluded that Applicant failed to prove lack of adverse effect by a preponderance of the evidence;

Applicant cites no particular finding of fact or conclusion of law in this exception but refers to exception 9, where he provides more specific information. The Department will address that information where it appears below.

Exception 8. The Hearing Examiner incorrectly applied the rule in the Department's *Takle* Decision

Applicant argues that the Hearing Examiner incorrectly relied upon *In the Matter of the Applications for Beneficial water Use Permits 76691-s76H, 72842-s76H, 766692-s76H and the Application for Change of Appropriation Water Right G (W) 111151-76H by Robert and Marlene Takle* for the proposition that "[s]ubsurface water is treated as if it were the surface water source to which it is tributary" because "[t]hat case dealt with a completely different" and apparently expanded definition of groundwater "than the one applicable to this matter."

The Hearing Examiner relied upon *Takle* in the context of a legal availability analysis as set forth in Mont. Code Ann. 85-2-311 (a) (ii)—a comparison of physical availability of and existing legal demands on the relevant source of supply in the area of potential impact. The Hearing Examiner concluded that the Applicant had failed to show legal availability not under any particular definition of ground water but because the applicant failed to "adequately characterize the extent of the cone of depression from pumping during the proposed well during the period of diversion" and thus failed to identify the area of potential impact. The Department

finds the Hearing Examiner's incidental reliance on a non-material aspect of *Takle* the administrative law equivalent of dicta—neither a necessary finding of fact nor the foundation for a conclusion of law. Therefore, the Department finds that even had the Hearing Examiner relied upon *Takle* in error, altering her reliance would not alter her finding.

Exception 9. The Hearing Examiner incorrectly found (finding of fact 22) that Applicant's consultant Tracey Turek's tests did not show lack of adverse effect by a preponderance of the evidence.

Applicant argues that finding of fact 22 misunderstands the evidence presented by his expert's aquifer test and mistakenly focuses on variables that could effect and distort test results rather than what the Applicant describes as "systematic effects of changes in the pump regime against these background changes." Because the test's relevance is limited to its ability to prove a lack of adverse effect on existing rights by a preponderance of the evidence, it is logical to conclude that where it is not possible to isolate the effects of test well pumping from the effects of canal leakage or accidental flow interruption by a fencing contractor, it is also not possible to determine what the effects of well pumping might be. The Hearing Examiner's finding relies upon competent and substantial evidence that the test results were unreliable in disproving lack of adverse impact and the Department will not disturb it.

Exception 10. The Hearing Examiner incorrectly found (findings of fact 24 and 25) that the Applicant could not control water use in order to prevent adverse effect.

Applicant argues that a "very general statement" made by the staff expert at the hearing that the impact of pumping might persist for weeks or months was insufficient grounds for the Hearing Examiner to conclude that the Applicant's ability to shut off his pump was insufficient guarantee of a lack of adverse effect. Applicant misstates the burden of proof. Mont. Code Ann. § 85-2-311 (1) (b) requires the Applicant to prove, by a preponderance of the evidence, that there will be no adverse effect on the water rights of prior appropriators. Staff expert Uthman's testimony established the potential for such effect. The Hearing Examiner found that the Applicant had not presented evidence sufficient to eliminate that possibility, as he was required

to do under the applicable statute before his application could lawfully be granted. The Department will not revoke or modify a finding based upon the competent and substantial evidence presented by the Department's staff expert.

ORDER

Application for Beneficial Water Use Permit No. 76H-30005957 is hereby **denied**.

NOTICE

This final order may be appealed by a party in accordance with the Montana Administrative Procedures Act (title 2, chapter 4, Mont. Code Ann.) by filing a petition with the appropriate District Court within 30 days after service of this order. If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing District Court, the requesting party must make arrangements for the preparation of the written transcript with a transcriber. If that party makes no arrangements, the Department will simply transmit a copy of the audio recording of the oral proceedings directly to the District Court.

Dated this 15th day of June 2006.

/Original signed by Britt T. Long/

Britt T. Long
Hearing Examiner
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CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Notice of Oral Argument on the Exceptions to the Proposal for Decision was served upon all parties listed below on this 15th day of June 2006 by first class United States mail.

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